Strasbourg slams old democracies on elections

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On July 10 this year, the Grand Chamber of the European Court of Human Rights delivered a seminal judgement in the field of elections in the case of Mugemangango v. Belgium. Beyond its implications for Belgium in particular and the interpretation of Article 3 of Protocol 1 of the ECHR in general, the judgement rocks the long-standing distinction in Strasbourg case-law between old and new democracies. The message from Strasbourg is as clear as it is timely: The rule of law applies equally for all.

Judging Parliament as the judge of its own election

The case originated from the 2015 elections to the Walloon Parliament in Belgium, where the applicant stood but failed to win a seat by a mere fourteen votes. Since more than 20.000 ballot papers were declared blank, void or disputed in his constituency, the applicant demanded a recount. When his request was denied by the election authorities, the applicant lodged a formal complaint to the Walloon Parliament, which is the only and final authority on election complaints. In Belgium, like in a number of other European countries, Parliament is the sole and final judge of its own elections. The Credentials Committee hearing the case recommended that the ballots in the applicant's constituency be recounted. However, the plenary, which included the newly elected members from the applicant's constituency, voted to approve the credentials of all the elected representatives, and thus dismissing the applicant's demand for a recount.

Before the Grand Chamber of the ECtHR, the case was more or less framed as a matter of principle: Can Parliament be the judge of its own elections without any recourse to a court or another judicial body? The applicant argued that the Walloon Parliament had acted as both judge and party in the examination of his complaint, and that this had infringed on his right according to Article 3 of Protocol 1 to stand as candidate in free elections. The Belgian government on the other hand, argued that the Walloon Parliament's decision to deny a recount was correct, and that the Belgian system of Parliament being the judge of its own election was part of the country's constitutional heritage, in which parliamentary autonomy was rooted in the principle of separation of powers.

In a unanimous decision, the Grand Chamber of the ECHR sided with the applicant and found a violation of both the right to free elections in Article 3 of Protocol 1 and the right to an effective remedy according to Article 13. The Grand Chamber concluded that the Walloon Parliament was neither sufficiently impartial, its powers not circumscribed with sufficient precision, and the applicant was not provided with sufficient procedural safeguards against arbitrary decisions to comply with the state's positive obligation to provide an effective examination of election disputes.

The Grand Chamber decision does not explicitly rule out that the Belgian system can be maintained if sufficient guarantees for Parliament's impartiality and procedural rights for the complainant can be provided. However, it is very hard to see how any parliament in any circumstances could be considered as sufficiently impartial to decide on disputes on the election result. While the newly elected members from disputed constituencies could be recused from the validation of their own credentials, their party groups would nonetheless be directly affected by the decision. Indeed, as mentioned by several judges in concurring opinions, the only possible conclusion of the Grand Chamber decision is that appeals on the election result must in the final instance be appealable to an independent judicial body.

A decision with wide-reaching consequences

As such the outcome of the case is not surprising since the ECtHR has come to the same conclusion in previous cases where Parliament had decided on the allocation of seats without the possibility of appeal before a judicial body (Grosaru v. Romania (2010) and Paunovi# and Milivojevi# v. Serbia (2016)). In its *amicus curiae* brief, the Venice Commission too was adamant that European election law and rule of law standards required that complaints on the election result be decided by an impartial judicial body that guaranteed certain procedural safeguards similar to those of Article 6 of the ECHR.

However, the Mugemangango decision is noteworthy because it is framed so that it pertains to not only to the election dispute resolution system in Belgium, but also the similar systems in a number of other countries in which Parliament is still the judge of its own election, namely Denmark, Iceland, Luxembourg, the Netherlands and Norway. The Grand Chamber's assessment of the Belgian system, in particular on the impartiality of Parliament, applies equally for these other countries.

The effects of the decision may also extend to two other countries. In Italy, the Court of Cassation decides election complaints, proclaims the election results and allocates the seats, but the final decision is taken by the respective chamber of Parliament. In Sweden, election complaints are decided by an extra-parliamentary body which is presided over by a judge, but in which the six additional members are members of Parliament. In the 2010 case Grosaru v. Romania, the ECtHR found that a similar body with a majority of parliamentarians was not sufficiently impartial to provide an efficient remedy in election disputes.

A loyal implementation of the Mugemangango decision should result in fundamental changes of the election dispute resolution system not only in Belgium, but also in Denmark, Iceland, Luxembourg, the Netherlands, Norway, and possibly also Italy and Sweden. Some kind of impartial judicial remedy must be introduced, which in most if not all of these countries will require constitutional amendments. The Mugemangango decision might therefore be one of the most wide-reaching ECtHR decisions in years. In its collateral effects, the decision can be compared to the 2005 Grand Chamber decision in Hirst v. United Kingdom (no. 2), in which the Court ruled that blanket restrictions on prisoner's voting rights, found in several member states, violated the Convention.

In two countries, change is already under way. In Norway, a joint expert and political commission recently recommended to introduce a new judicial body to decide on election disputes and for the possibility to appeal the Parliament's validation of the election result to the Supreme Court. If the proposed constitutional amendments are passed, the new election complaint system can be in place for the parliamentary elections in 2025. In Luxembourg, the 2019 proposal for a new constitution introduces the possibility to appeal the Parliament's verification of credentials to the Constitutional Court.

No double standards

Perhaps the most striking and timely part of the Mugemangango decision is the Grand Chamber's terse dismissal of democratic tradition and informal norms of self-restraint as sufficient safeguard for the rule of law. This dimension of the decision is noteworthy in light of the growing schism between certain Central- and Eastern European countries and the so-called old democracies in Northern and Western Europe on rule of law issues. Countries such as Poland and Hungary frequently accuse European institutions of double standards in the enforcement of rule of law standards. The Mugemangango decision tells another story.

The Belgian government, supported by Denmark intervening as a third-party, argued that the principle of Parliament being the judge of its own election without recourse to a judicial body, was an integral part of their constitutional structures and the "long established and firmly entrenched democratic traditions". Accordingly, Belgium and Denmark held that their particular democratic traditions and context had to be taken into account in the assessment of the right to free elections in Article 3 of Protocol 1. Indeed, most of the above-mentioned countries affected by the decision are frequently found on the top tier of democracy indexes.

While the Grand Chamber dutifully reiterated the wide margin of appreciation in the field of election law and the importance attached in previous cases to the country's political evolution and context, it did not respond to the Belgian and Danish call for a lower threshold for old democracies. There is nothing in the decision to suggest that the particular democratic traditions of Belgium were taken into consideration. In the words of judge Wojtyzcek in a concurring opinion, "blind spots in the system of rule-of-law guarantees do not belong to the core of the common constitutional heritage, even if they are deeply rooted in a national constitutional tradition."

Indeed, the Mugemangango decision may be read as the latest step in a gradual departure from the Court's old but flawed maxim that political rights according to Article 3 of Protocol 1 are distinctly different from civil rights and obligations and thus falling outside the scope of Article 6 and its procedural safeguards (Pierre-Bloch v. France, 1997). While parliamentary elections constitute a political body, the elections themselves are held according to legal rules. The disputes arising from alleged breaches of electoral law, including disputes on the election result and the allocation of seats, are therefore no less legal in nature than disputes concerning civil rights and obligations in other fields. Given the fundamental importance of elections for an effective political democracy, as enshrined in the preamble to the

Convention, resolving election disputes by an impartial judicial body observing procedural guarantees against arbitrary decisions may very well be the ultimate expression of the rule of law.

Now, the Grand Chamber's decision should not be read as dismissing the importance of the political context and democratic development in each country when assessing election law in light of the ECHR. However, when it comes to the validity of the election result and the allocation of seats, a question which naturally is essential for the right to free elections according to Article 3 of Protocol 1 and for the rule of law, Strasbourg does not accept a separate standard for old democracies. The logic appears to be that in such a fundamental rule of law issue, informal norms flowing from democratic tradition however important they may be for the quality of democracy, are simply not sufficient if put to the test. In the ever more polarized political climate in many European countries, and in a world where the integrity of elections is frequently put in question due to the threat of manipulation via social media and powerful targeted advertising, the rigid Strasbourg approach may be prudent for new and old democracies alike.

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The author was rapporteur on the Venice Commission's amicus curiae brief in the case of Mugemangango v. Belgium and a member of the commission tasked with drafting a new election law in Norway.
